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IN THE

Supreme Court of the United States

October Term, 1963
No. 110

WILLIAM MALLOY,

Petitioner,

vs.

PATRICK J. HOGAN, SHERIFF OF HARTFORD COUNTY,

Respondent.

On Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE.

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Interest of Amicus Curiae.

The Constitution of California accords a privilege against self-incrimination. (Cal. Const., art. I, §13.) This privilege has been scrupulously protected by the California courts. (See *People v. Talle,* 111 Cal. App. 2d 650, 245 P. 2d 633.) The relationship between it and the privilege accorded by the Fifth Amendment to the United States Constitution is a matter of vital concern. (See *Adamson v. California,* 332 U. S. 46.)

ARGUMENT.

While we support the position of respondent, we do so upon grounds not stated in respondent's brief. The law was settled by this Court not sixty years ago. (*Twining v. New Jersey*, 211 U. S. 78.) Forty years later, *Twining* was reaffirmed. (*Adamson v. California*, 332 U. S. 46.) Just three years ago, both *Twining* and *Adamson* were reaffirmed. (*Cohen v. Hurley*, 366 U. S. 117.) We would regard it, therefore, as unthinkable were they to be hastened into oblivion by any concession of respondent that they are tainted by time, that they are inconsistent with other decisions of this Court, or that they should no longer be law. (See Resp. Br. pp. 6-17.)

In our view, the historical record does not require this Court to hold, and would not justify this Court in holding, that the Fifth Amendment privilege against self-incrimination was incorporated into the Fourteenth Amendment by virtue of the latter's adoption. We are aware, of course, of the case argued with such eloquence and vigor by Mr. Justice Black. (*Adamson v. California*, 332 U. S. at pp. 68-123.) But the weight of the evidence is to the contrary. (See Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stanford L. Rev. 5-139.) Nor do we think such an abrupt departure from existing law compelled, much less justified, by the recent decisions of this Court on such disparate topics as confessions and searches and seizures. Surely the point of the confession cases is that a state may not use an extrajudicial confession obtained by what may be described as methods of bar-

barism. (See *Haynes v. Washington*, 373 U. S. 503.) And surely it is the point of the search and seizure cases that in the absence of consent or probable cause to arrest, a state may not use evidence obtained through unregulated rummaging by the police. (See *Mapp v. Ohio*, 367 U. S. 643; *Ker v. California*, 374 U. S. 23.) None of these cases, we submit, afford convincing analogies to the case at bar or add weight to the argument that *Twining* and *Adamson* should be overruled.

Conclusion.

Believing, as we do, that *Twining* and *Adamson* were rightly decided, we urge that the judgment appealed from be affirmed.

Respectfully submitted,

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